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Kiobel v. Royal Dutch Petroleum: The Alien Tort Statute's Jurisdictional Universalism in Retreat

*Kenneth Anderson**

I. Introduction

A case (unusually) spanning two Supreme Court terms, *Kiobel v. Royal Dutch Petroleum*¹ offered the Court an opportunity to provide much-needed guidance on the proper scope of the Alien Tort Statute.² The ATS, a long-obscure provision of the first Judiciary Act of 1789, was forgotten shortly after it was passed until it was revived in the 1980s by activist lawyers seeking a vehicle for all manner of lawsuits against an ever-expanding list of private actors, based on claims of violations of international law. As plaintiffs in the last decade have undertaken ATS suits against corporations, the stakes have grown precipitously and the battles have become more sharply contested.

This essay begins by setting *Kiobel* and the ATS in the legal and policy context of transnational legal disputes. Behind the legal questions of jurisdiction are more abstract questions of liberty and sovereign popular government—what issues of political and moral principle are at stake in these disputes? Following this context-setting, I turn to the *Kiobel* case itself, setting its facts alongside the text of the ATS and summarizing its unusual procedural history at the Court. I then turn to the history of the statute, its long desuetude and modern revival, and give a brief history of the kinds of claims made under the ATS by the time of the *Kiobel* decision. In doing so, I bring out the legal and political controversies that gradually swirled around the ATS—both narrowly doctrinal legal controversies on one hand and deeply

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¹ *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013).

² 28 U.S.C. § 1350.

contested political questions on the other, raising at bottom the legal legitimacy of U.S. courts' claims to reach extraterritorially so far and deep under the authority of "international law."

At the heart of the modern ATS, I suggest, is its peculiar textual commingling of international and domestic law predicates. At the level of political theory, I go on to ask whether the ATS in its modern incarnation is best understood not truly as "international law" but instead as what might be called the "law of the hegemon," imposed by a dominant global power in an act of will. I speculate that the Court's retreat from the attempt to carry out universal jurisdiction through distinctively American legal mechanisms represents a tacit judgment that American hegemony, in a world of competitive and rising new global and regional powers, does not have the reach it once had.

The Court made a surprising pivot in *Kiobel*. It took the case in order to settle whether corporations could be liable in ATS suits, but it instead decided to settle the more fundamental question of when American courts have jurisdiction over foreign defendants, whether individual or otherwise. I examine in detail the two main *Kiobel* opinions—the majority opinion by Chief Justice John Roberts and the minority concurrence (agreeing in result, but not reasoning) by Justice Stephen Breyer. I conclude by observing that other laws—and not the ATS alone—raise problems of cross-border and extraterritorial jurisdiction, and offer some speculation on what questions remain after *Kiobel* and whether the decision will indeed act as a practical limit on ATS litigation.

II. Liberty, Self-Governance, and the Problem of Universal Jurisdiction

The ATS and *Kiobel* embody a large, thorny problem in a global economy governed by particular national legal systems—whose courts shall have jurisdiction to hear what kinds of claims against which kinds of actors? One traditional approach to jurisdiction seeks to assign disputes to the "right" national legal system and directs other national systems to refrain from hearing cases more suitably heard elsewhere. At the opposite pole is so-called universal jurisdiction, in which (at least for certain offenses of high seriousness) any national legal system can assert jurisdiction over an alleged wrongdoer and dispute, at least if a "home" legal system has not provided an adequate remedy for a wrong.

If its literal, surface language is read without further inquiry, the ATS—all in a single sentence in the first Judiciary Act of 1789—provides an extremely unusual hybrid of these two approaches. It seemingly asserts the jurisdiction of U.S. courts over apparently any violation of the law of nations, and without stated territorial limitation. This is to create a sort of quasi-universal jurisdiction for international law violations. And yet it does so only via an action in tort, and it makes that action available *only* to alien plaintiffs, not to U.S. citizens. Judges, lawyers, academics—the Court itself—have wondered at this peculiarity. Does an obscure 1789 statute really bestow the gift of an unlimited credit card, as it were, on contemporary and global human rights claims? As a historical matter, could this possibly have been the intent of Congress in the infant republic?

A dearth of historical background or legislative history specific to the statute's enactment has made this question difficult to answer. In any case, for it to matter, one has to believe that judges interpreting the statute today would be swayed by the historical context in which its language was written. At least until recently, the ATS has grown up as an ahistorical construction, as judges have interpreted the raw language in light of contemporary concerns. In its first consideration of the ATS a decade ago, *Sosa v. Alvarez-Machain*, the Court did introduce a historical element, but left it still mostly within judges' prudential discretion.³ At the same time, historical inquiry into how the ATS fit into the context of its own time, and into the traditional understandings of jurisdiction that then held sway, has continued. The new historical inquiry tends to reveal a mostly commonsense meaning to the ATS as a law drafted to remedy particular diplomatic and political difficulties of a sort that would presumably have concerned the First Congress. It is not rooted in some drastic departure from traditional jurisdictional categories in which the appropriate scope of judicial power relates closely to the territory on which the allegedly tortious behavior took place.

Although not without its own disputes, the new historical scholarship is thus generally unfavorable to the ahistorical universal-jurisdiction construction of the ATS elaborated in U.S. courts over the last two decades. This is so if for no other reason than that the ahistorical construction could not purport to explain—even merely

³ *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).

as a plausible hypothesis—why Congress in 1789 would ever have enacted the ATS. Calling it “mysterious” and “obscure”—two common appellations describing the ATS—or saying with a shrug, “Well, it did,” are not enough. Yet an important question has been, even as this new historical work has developed, whether courts would back off on their own from the ahistorical, universalist judicial constructions of jurisdiction widely in place today. By this point, judicial constructions have made the ATS a legal vehicle for tort suits by alien plaintiffs against entirely alien defendants over alleged actions taking place entirely outside U.S. territory.

The accumulation of precedent in favor of ahistorical universal-jurisdiction readings of the ATS essentially ensured that only the Supreme Court could settle these issues of fundamental interpretation. The Court’s earlier venture into the field, *Sosa*, had failed to do so. In *Sosa*, the Court did invoke the language of traditional jurisdiction as a factor in judicial caution, but it declined to draw clear lines of a jurisprudential sort. Instead, it prudentially chose to prune the formal legal categories of causes of action that would be available under the ATS. That still left a framework of universal jurisdiction over a contested set of claims. *Kiobel*, by contrast, returns to historical analysis of the traditional bases on which a court might exercise cross-border jurisdiction. It thus appears to signal a genuine retreat from capacious universal-jurisdiction concepts and, perhaps just as important, a reinvigoration of traditional doctrines of national jurisdiction by courts across borders in a global political economy. Traditional grounds of jurisdiction over cross-border claims might be interpreted narrowly or broadly—and *Kiobel*’s several opinions offer both—but the intellectual locus of argument has now shifted firmly away from assertions of universal jurisdiction based on a literal reading of the words of the ATS.

This shift back toward traditional bases of jurisdiction in civil claims that run cross-border or extraterritorially matters quite a lot in considerations of liberty—particularly economic freedom—under conditions of administrative, regulatory states. The concern at the global level is that unfettered, universal tort regimes such as the ATS undermine the concept that morally legitimates sovereignty as far as the United States goes—popular sovereignty, the sovereignty of the people over a government answerable to them. Popular sovereignty for the people of the United States can only work, as a general moral

principle, if it is limited to the will of that people and respects the will of others in the world. Traditionally, this is done by tying “peoples” to “places,” thus yielding a basic jurisdictional principle in which both the sovereignty and the limits of national courts are established and legitimized by the sovereign peoples with which they correspond. In this conception of the role of courts and their anti-majoritarian character in a system of sovereign self-government, jurisdiction is a moral and political concept, and not merely a technical legal one. This is because the traditional bases of jurisdiction—over sovereign territory and over a sovereign’s nationals, particularly—ensure both that those subjected to the justice of a national sovereign’s courts have some legitimate connection to its rule and that those same subjects are not subjected to the rule of others with whom they have no connection.

Courts and judges, that is, are not simply about “justice” in the abstract; they are also about a particular institutional role in a system of self-governance and, hence, liberty. Universal jurisdiction threatens sovereignty and, in the case of the United States and other countries governed by a rule of law that runs to the people, threatens the rule of law and the liberty of its people to govern themselves. Chief Justice Roberts quotes Justice Joseph Story’s opinion in *The La Jeune Eugenie*: “No nation has ever yet pretended to be the *custos morum* [guardians of morals] of the whole world.”⁴ It’s not on account of mere judicial prudence that national courts should decline to be the moral custodians of the world, but instead a matter of fundamental legitimacy for the concept of self-governance that, in the American conception, arises from the people and the pooling of their liberties to govern themselves.

In practice, to be sure, we know fully that there are instances of genocide, crimes against humanity, slavery, and a handful of other crimes that nearly all of us are willing to put into a special category—those whose perpetrators have made themselves *hostis humani generis*, enemies of all mankind. The problem with all universal-jurisdiction arrangements, insofar as they purport also to accept the basic principles of sovereign self-governance as a feature of liberty, is how to keep this genuine if narrow moral and legal category in check.

⁴ Kiobel, 133 S. Ct. at 1668 (citing *United States v. The La Jeune Eugenie*, 26 F. Cas. 832, 847 (C.C.D. Mass. 1822)).

How do you keep the door open only to the most egregious and obvious claims, and only against those who are directly responsible? One way is to treat the predicate acts as crimes prosecutable only by public authority, not as matters of private pursuit through actions seeking civil liability for money damages. A second is to limit the targets of such legal actions to morally culpable agents—that is, to individual defendants. It is noteworthy that the jurisprudence of the ATS does neither of these things—quite the contrary—and *Kio-bel*, however useful its contribution, fails to address either of those crucial issues. The International Criminal Court, by contrast, does both of those—and even it, or at least its successive prosecutors, is arguably showing a remarkable internal dynamic toward expansion. While universal jurisdiction for certain truly awful things is not truly in dispute, there is no getting around the internal drive of schemes of universal jurisdiction to become a one-way ratchet of expansion.

Thus we see the importance of the ATS in the grander narrative of liberty and self-governing polities. President Abraham Lincoln once defined sovereignty, which we sometimes call self-government, as a “political community, without a political superior.”⁵ The ATS’s universalist reach is incompatible with that, for ourselves and for others. Yet it would be morally wrong, not to say churlish, to rest upon abstractions of political theory and ignore the liberties of those whose interests are often sought to be vindicated through ATS suits. The ATS’s original human rights case, *Filártiga v. Peña-Irala*, arose against a former foreign official living illegally in the United States who was quite plausibly alleged to have been involved in torture and forced disappearance.⁶ While there is an excellent case to be made that such a case, even with plaintiffs and defendant both physically resident in the United States, was essentially committed to the foreign policy and political branches of the U.S. government rather than the courts, torture and murder also present questions of liberty.

But the more recent cases that have emerged for large monetary claims are only notionally about genocide, crimes against humanity, slavery, and so on. In actual, practical fact, the most sympathetic of them are about labor conditions in faraway places, child labor, wages, the safety of factories in places like Bangladesh, and environmental

⁵ Abraham Lincoln, Message to Congress, Special Session, July 4, 1861.

⁶ *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. N.Y. 1980).

damage. These raise questions of individual liberty and self-governance in the global economy, too, at least morally. Yet the ATS and similar devices for using the U.S. courts post hoc to regulate labor or environmental conditions in the global manufacturing or commodities supply chain—and not even necessarily when done by U.S. entities, but by anyone anywhere—cannot possibly succeed, even if one thought it the moral course to pursue them. These are important goals, but they will have to be pursued in other ways.

III. The ATS Considered as a Statute and *Kiobel's* Roots in *Sosa*

The ATS reads in its entirety:

The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.⁷

Apart from two appearances in late 18th-century cases, another in a Supreme Court opinion from 1908, and an opinion from 1960 in the U.S. Court of Appeals for the Second Circuit,⁸ the ATS was dormant and unknown until resurrected by human rights lawyers in the 1970s and '80s as a vehicle for pursuing human rights violators. Concerns about ATS overreach have been a constant from that day to this. Seeming clarifications like *Sosa* left enough basics unsettled to provide encouragement to litigants and judges who were inclined toward capacious views of the ATS or of the law of nations (nowadays often defined as a matter of “customary international law”).

Indeed, the most profound effect of *Sosa* was quite possibly the opposite of what the Court may have intended. *Sosa* said that claims under the statute had to allege misconduct universally acknowledged as serious under international law. The result was to ratchet up the rhetorical nature of claimed violations—plaintiffs *had* to charge defendants with extreme misconduct to keep an ATS claim going. In that case, however, everything becomes—well, *genocide* or something similar. What might have been thought to be serious and yet, for all

⁷ 28 U.S.C. § 1350 (2013).

⁸ See *Moxon v. The Fanny*, 17 F. Cas. 942 (No. 9,895) (D.C. Pa. 1793); *Bolchos v. Darrel*, 3 F.Cas. 810 (No. 1,607) (D.S.C. 1795); *O'Reilly de Camara v. Brooke*, 209 U.S. 45 (1908); *Khedivial Line, S.A.E. v. Seafarers' Int'l Union*, 278 F.2d 49, 51–52 (2d Cir. 1960) (*per curiam*).

that, “ordinary,” labor or environmental misconduct was suddenly re-described using the language of genocide, crimes against humanity, war crimes, slavery, and a few others. The most serious international crimes were cheapened into a rote pleading in order to get into federal court.

Beyond *Sosa*’s failure as a prudential heuristic for the lower courts, it did not answer—indeed it specifically reserved, in a famous footnote—a crucial question: could *corporate* entities, with their deep pockets, be sued along with individuals? The Court’s restraint on this point ensured that it would have to revisit the question. Between *Sosa* and *Kiobel*, ATS litigation shifted sharply from individual to corporate defendants, and from claims of *direct* participation or responsibility in human rights violations to claims of corporate “aiding and abetting” of such violations by governments and others. In an increasingly globalized and interlinked economic environment, many different behaviors can be construed as “aiding and abetting.”

The claims advanced in *Kiobel* exemplified this trend. The plaintiffs were Nigerian nationals alleging that during the 1990s, various corporations, including defendant Royal Dutch Petroleum (Shell, a non-U.S. corporation), aided and abetted the Nigerian government in human rights and environmental abuses constituting violations of the law of nations. Shell denied the factual allegations as well as their adequacy as factual predicates to support such extreme charges as genocide and crimes against humanity (particularly as arising from alleged environmental harms). As a legal matter, it also contested whether the law of nations admitted of corporate liability and whether either the law of nations or the *Sosa* standard recognized aiding and abetting as a distinct category of violation. Because of the costs threatened by a discovery process for acts taking place in remote parts of Nigeria 15 or so years ago, among other reasons, the district court ruled that while in its view—as a matter of law—corporate liability and aiding and abetting liability could go forward, it would certify these questions for direct appeal to the Second Circuit.

The Second Circuit’s decision in *Kiobel* created a sensation within the ATS legal community because the majority (in a 2-1 vote) held in sweeping terms that only individuals and not corporations could properly be ATS defendants.⁹ The dissent was an equally sweeping

⁹ *Kiobel*, 133 S. Ct. at 1668.

cri de coeur on behalf of universal jurisdiction and the global rule of law. The Second Circuit decision created a sharp circuit split—one that mirrored in important ways the majority and the dissent in the Second Circuit panel—and the Supreme Court agreed to hear the case.

Kiobel is procedurally unusual in that it was accepted for argument by the Supreme Court in 2011 on the circuit-split question: whether the ATS reached corporations as defendants. At oral argument, however, the justices repeatedly pressed counsel on a quite different and legally prior issue—advanced especially by several of the (many) amicus briefs submitted to the Court¹⁰—whether the ATS even had legal purchase on a case like *Kiobel*, which had no U.S. domestic links of person or place and thus no traditional base of jurisdiction whatsoever. It was a case in which plaintiffs, defendants, and the territory where alleged misconduct had occurred were all foreign—what the vernacular of ATS litigation has come to call a “foreign-cubed” case.¹¹

During oral argument, the justices were drawn into these questions of territorial jurisdiction. Since they had not been part of the original questions set for the parties (strikingly, they were drawn largely from the amicus briefs, and it is not too much to say that the amicus briefs redefined the question for the Court), after oral argument the Court set additional argument for the following term on the following question:

Whether and under what circumstances the Alien Tort Statute, 28 U.S.C. § 1350, allows courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States.¹²

Additional argument took place on October 1, 2012, and the Court handed down its decision on April 17, 2013. As to the holding, it was unanimous (9-0) in favor of defendant Shell. On the reasoning of the

¹⁰ The Cato Institute submitted amicus briefs in both rounds of Supreme Court argument in support of defendant Shell; the author of this article likewise signed (successive) amicus briefs submitted by a group of legal scholars, also in support of defendant.

¹¹ Transcript of Oral Arg., *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013) (No. 10-1491).

¹² *Kiobel v. Royal Dutch Petroleum Co.*, 132 S. Ct. 1738 (2012) (No. 10-1491) (Order for Reargument).

holding, however, the Court split 5-4: a majority opinion (authored by Chief Justice Roberts, joined by Justices Antonin Scalia, Anthony Kennedy, Clarence Thomas, and Samuel Alito) and a minority concurrence (authored by Justice Breyer, joined by Justices Ruth Bader Ginsburg, Sonia Sotomayor, and Elena Kagan), with two additional short concurrences (one by Kennedy; and one by Thomas, joined by Alito). The opinions address themselves solely to the question for additional argument—the territorial reach of the ATS—and the question of the initial argument, corporate liability under the ATS, thus remains unanswered.¹³

IV. *Filártiga* and the Modern Reboot of the ATS

Talk of jurisdiction can seem abstract. It could be argued: isn't the modern ATS a way of helping to rectify some very real harms at little real cost to Americans' liberty? The cases at issue are against corporations, mostly large multinational corporations with ready access to lawyers. Some allegations routinely made in ATS filings are undoubtedly mere filler, but many others do cite serious abuses, whether actual violations of the "law of nations" or not.¹⁴ And what of abuses by American corporations, which would be reachable even under more traditional jurisdictional bases? Apart from the expenditure of some judicial resources—which might be an important practical issue, but

¹³ In a somewhat related case, arising not under the ATS but under the 1992 Torture Victim Protection Act (TVPA), *Mohamad v. Palestinian Auth.*, 132 S. Ct. 1702 (2012) (accepted for review by the Court in 2011; argued in 2012 in tandem with the first round of *Kiobel* argument), the Court ruled, in an opinion by Justice Sotomayor, that the TVPA did not apply to organizations, including the defendant Palestinian Authority. The opinion affirmed the holding of the D.C. Circuit and relied on the language of the statute referring to "individuals," which it interpreted to mean actual human beings. The TVPA decision was unanimous and appears to have little of the controversy attached to the ATS cases.

¹⁴ Chinese corporations operating mines in African countries such as Zambia have had many well-documented abuses, often of a very serious nature, including the shooting and wounding of 11 local Zambian workers by Chinese managers of a coal mine in that country. See Chibaula D. Silwamba, *Zambia Charges Chinese in Mine Shootings*, CNN.com, Oct. 20, 2010, <http://www.cnn.com/2010/world/africa/10/19/zambia.chinese.mine.shooting/index.html>; see also Human Rights Watch, "You'll Be Fired if You Refuse": Labor Abuses in Zambia's Chinese State-Owned Copper Mines, 2011, available at <http://www.hrw.org/sites/default/files/reports/zambia1111ForWebUpload.pdf>.

not one of principle—what do other Americans have to lose from a broadly interpreted ATS?

Something like this line of reasoning seems to have animated the courts in their early embrace of the ATS in the late 1970s and '80s. Certainly, that was my personal experience as a human rights lawyer in the 1980s.¹⁵ Volunteering and then working professionally for human rights organizations, my anecdotal perception was that opinions within the New York City human rights advocacy community shifted and overlapped around two general currents. The first was that the ATS was a great avenue for bringing U.S. courts to bear, by creating a form of universal jurisdiction for human rights cases on an expanding writ of what “human rights” could be read to mean. The second, cutting the other direction (and a strand of opinion that essentially disappeared after 1990), was that ATS litigation, like most human rights litigation in U.S. courts, was a distraction from the avenues that strategically mattered. What mattered was pressure on the executive through Congress and the media, in order to influence the United States’ bilateral relations with other countries. Human rights litigation, however valued by lawyers, was very often an expensive diversion of resources toward judicial victories that, even when they happened, left no lasting mark. The world, of course, has changed. These views were not entirely inconsistent at the time—a matter of strategic judgment and resource allocation—but they cut in different directions.

Another factor advancing broad readings of the ATS was that at that point originalism had not yet become respectable in academic circles—not that human rights lawyers would likely have paid it much heed in any case. Instead the statute offered plain language with its own austere power and beauty; a relic from the time-before-time that nonetheless served as a key to unlock the door in the present to everything that one might imagine under the rubric of the law of nations. The language was unencumbered (“blessedly so,” one leading human rights lawyer in the early 1980s remarked to me) by

¹⁵ I started volunteering for Human Rights Watch—then Helsinki Watch and Americas Watch Committees—through the Harvard Law School Human Rights Program in 1983, and later went to work for Human Rights Watch as the first director of its Arms Division. I also worked for the International Human Rights Law Group, and later became general counsel to the Open Society Institute.

any 18th-century legislative history, or 19th- and 20th-century lines of cases, that might undercut its abstract purity in the 20th.

It was against that backdrop that the Second Circuit opened today's ATS era with its pathbreaking opinion in *Filártiga*. Reversing the district court's dismissal of the claim on traditional jurisdictional grounds, the appeals court reached to the language of the ATS to hold that (1) because torture was a violation of "the law of nations"; and (2) because the plaintiffs were aliens (citizens of Paraguay whose son, they contended, had been kidnapped and tortured to death by Paraguayan police agents responsible to defendant Peña-Irala); therefore (3) the district courts had "original jurisdiction" of "any civil action" in "tort" in the suit.¹⁶ True, the case for U.S. court jurisdiction was enabled, or at least strengthened, by the fact that at the time of the suit, both plaintiffs and the defendant were physically present in the United States (defendant Peña-Irala was arrested and deported for having overstayed his visa). Moreover, attempts to pursue a case in Paraguayan courts had gone nowhere. In that sense, traditional jurisdictional considerations of some contact with the United States as a forum, and some comity-like consideration such as exhaustion of local remedies (insofar as a meaningful exercise), had been met.

Those considerations aside, however, the suit still consisted of a U.S. tort action by one alien against another alien for acts occurring entirely in a foreign place at a time years earlier at which the defendant had been a senior police official of a foreign sovereign; the sovereign government of Paraguay, of course, could not be hauled into U.S. district court. Yet Judge Irving Kaufman had no difficulty in laying out for the court (in sweeping language that Justice Breyer rather pointedly quotes): "[F]or purposes of civil liability, the torturer has become—like the pirate and slave trader before him—*hostis humani generis*, an enemy of all mankind."¹⁷

Judge Kaufman's opinion raised much applause and a few skeptical eyebrows, the latter especially when the judge wrote an article for the *New York Times Magazine* a few months later, largely endorsing a sweepingly universal and expansionist vision of the human rights role of U.S. federal courts in the world. The obligation of the federal courts to identify

¹⁶ *Filártiga*, 630 F.2d at 878.

¹⁷ *Id.* at 890.

egregious violations of international law is in many ways analogous to the courts' traditional role in redressing deprivations of civil liberties that occur at home. . . . The articulation of settled norms of international law by the Federal courts, much like their adherence to constitutional precepts, is an expression of this nation's commitment to the preservation of fundamental elements of human dignity throughout the world.¹⁸

This is stirring stuff, and in the heady early days of the ATS, it did not seem far-fetched. After all, if one looked to the statute (quite apart from any weight attached to the physical presence of plaintiff and defendant in the United States, which—take note—Justice Breyer specifically registers in his *Kiobel* concurrence), the literal words of the ATS require for U.S. jurisdictional purposes no more than an alien plaintiff and alleged conduct sufficiently well-pled to constitute a violation of the law of nations or a treaty of the United States. By some historical fortuity, in other words, this ancient statute almost miraculously offered a U.S.-law-specific way to take jurisdiction over certain universally condemned acts, such as piracy. Maybe this was not true universal jurisdiction as international lawyers would recognize it, but it was something similar and maybe even better, because affording something lacking in international law as such—civil liability.

It remained less than clear whether the ATS established, on its own, any actual causes of action, or instead functioned as a jurisdiction-granting statute that depended on other statutory vehicles to give it substantive claims to adjudicate. That issue arose in a case four years after *Filártiga*—*Tel-Oren v. Libyan Arab Republic*¹⁹—and occasioned a famous colloquy between D.C. Circuit Judges Harry Edwards and Robert Bork in their respective concurrences. Judge Bork argued that the ATS was a purely jurisdictional statute, and without something further, it conferred jurisdiction but gave plaintiffs no grounds on which to sue. His core contention was that neither treaties nor customary international law (the “law of nations” in the ATS) create individual, private rights of action in U.S. courts, unless self-executing or otherwise enabled by implementing legislation; and the ATS’s

¹⁸ Irving R. Kaufman, A Legal Remedy for International Torture?, N.Y. Times Mag., Nov. 9, 1980, at 44.

¹⁹ 726 F.2d 774 (D.C. Cir. 1984) (per curiam).

reference to the law of nations or treaties of the United States did not suffice to create them.²⁰

Judge Edwards agreed that neither customary international law nor treaties directly created private causes of action, but took the view that the ATS established something in U.S. domestic law that was more than mere jurisdiction. It transfused, so to speak, some amount of substance from international law into domestic law, through its reference to international law, and once part of domestic law, that was sufficient to create a substantive cause of action as a matter of domestic law.²¹ I spell out this debate in *Tel-Oren*, partly because the two sides are analytically clear and distinct, and partly because—although lower courts created a body of precedent allowing substantive ATS claims, contra Judge Bork—the question posed was not finally decided until *Sosa*, 15 years later.

V. International Law or “Faux-International Law,” Manufactured through the ATS?

How does *Sosa* answer the *Tel-Oren* debate? Solely jurisdictional or not? Private rights of action or not? Chief Justice Roberts explains in *Kiobel* that the statute

provides district courts with jurisdiction to hear certain claims, but does not expressly provide any causes of action. We held in *Sosa v. Alvarez-Machain*, however, that the First Congress did not intend the provision to be “stillborn.” The grant of jurisdiction is instead “best read as having been enacted on the understanding that the common law would provide a cause of action for [a] modest number of international law violations.” We thus held that federal courts may “recognize private claims [for such violations] under federal common law.”²²

The Supreme Court had taken *Sosa* in part to provide some limits to the kinds of claims that were being recognized in the district courts and courts of appeal; hence Roberts’s reference to a “modest number” of causes of action.²³ During the two decades preceding *Sosa*,

²⁰ *Id.* at 822–23 (Bork, J., concurring).

²¹ *Id.* at 786 et seq. (Edwards, J., concurring).

²² *Kiobel*, 133 S. Ct. at 1663 (2013) (citations omitted).

²³ *Id.*

the human rights community had brought a considerable number of ATS cases in the district courts. Many of them were uncontested—the defendants did not appear—resulting in default judgments. Others were what we might call “lightly contested”: defendants without substantial legal resources against comparatively well-funded, increasingly specialized human rights lawyers for the plaintiffs.

These suits were against individuals, typically former officials of some obviously abusive regime; the individuals and their assets were often either unavailable or judgment-proof. So, for a long time, the practical effect of ATS suits was largely symbolic. District court judges sometimes used them as occasion for pronouncements about the universality of human rights norms, and the growing roster of often uncontested or lightly contested claims encouraged broader views of the litigable content of “the law of nations.”

Even though these cases largely had not been litigated in meaningful ways, they created an accumulation of plaintiff-favorable holdings over time, as district court rulings cited each other in an increasingly thick web of seeming precedent, amid ever-stronger and more confident statements about the content of international law. The irony is that even as the federal courts moved to embrace “international law” as something they would enforce, they did so opining as distinctly American courts in distinctly American ways taking distinctly American views of the content of that “international law.”

In principle, American courts could ascertain the content of “international law” as readily as they could check up on the Internal Revenue Code. In practice, however, judges become familiar with such bodies of law by way of the arguments of lawyers practicing before them. And these uncontested or lightly contested cases sometimes—oftentimes—left less-than-expert federal court judges hearing a well-informed view of international law only from one side, that of the human rights advocacy lawyers.

As the number and sweep of the claims in ATS suits grew, one group watched with especially mixed feelings: foreign international law experts (whether from the academy, international organizations, or foreign ministries). On one hand, these respectable outsiders to American jurisprudence—America’s closest allies and friends, especially, but also economic and trading partners—mostly favored the outcomes from the standpoint of substantive human rights. On the other hand, they could not help feeling some dismay at the sweeping

moralism and frequently inexperienced pronouncements of the courts in the then-sole superpower. This was true both as to the *content* that American courts discerned in international law, and even more as to the *sources of authority* to which American judges turned in ascertaining and citing the content of international law: namely, *each other*.

As an example of distinctively American content, consider the strangely domesticated variety of international law articulated in *Sosa*, in which the Court refused to countenance causes of action founded on “violations of any international law norm with less definite content and acceptance than the historical paradigms familiar” when the ATS was enacted in 1789. No doubt the Court had good reasons of caution and prudence to draw such a line, but it seems almost to imply that its special version of international law would be considered to have stopped dead in its tracks in Blackstone’s day, not just in its content but in its mechanisms of elaboration. Such an implication would strike most observers in other countries as a fantastically radical rewrite of actually existing international law.²⁴

On the question of sources of authority, meanwhile, the court was simply more comfortable and familiar citing sister federal courts than to parse the pronouncements of tribunals halfway around the world. How could it be otherwise? That is as it *should* be in a system whose domestic legitimacy depends upon fidelity to legal authority derived from within that system. The American legal system is embedded in a constitutional republic in which the rule of law derives from the sovereignty of the people, through *their* constitution—that is, from *within*. The most persuasive and binding precedent for a U.S. court will therefore be an opinion of the Supreme Court, or the appellate court above itself; failing that, another appellate court, or another district court. And the procedural rules of the game—the rules of civil procedure, evidence, and so on—are necessarily those of the federal courts, too. These are federal courts elaborating, as Chief Justice Roberts says, “federal common law” whose content happens to be “international law”—in some sense. But the qualifiers—the scare quotes, or “in some sense”—are inevitable here. If this project was international law, where was the role of the *rest* of the world in creating it?

²⁴ *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 (2004).

Actual international law, the law of nations and treaties, does not operate this way. It has its own structure of authority, even if the nature of that authority is highly contested and is not likely ever to have the comfortable hierarchy of law in a settled domestic system. Those many disputes aside, it can be said with fair certainty that whatever the structure of authority—the “doctrine of sources”—in international law, it is not going to consist of the district and appellate courts of the United States citing each other.

So a deep question remains: is the ATS generating “international law”? Is ATS litigation a form of “state practice” in the evolution of customary international law, the state practice of a powerful state whose views (whether presented to the world through pronouncements of the State Department or by judges of the federal courts) will always matter? Does ATS jurisprudence constitute “international law” that happens to be proffered through the mechanism of American courts, as Judge Kaufman (author of *Filártiga*) and so many other early supporters believed? Or, instead, is it a sort of “faux-international law”: distinctly American law styling itself “international” and “universal,” but really just another exercise of American hubris and extraterritorial overreach?

Seen from the outside, the “international law” of the ATS is turned in upon itself, a nearly perfect narcissism, its gaze fixed on American law, processes, procedures, sources of authority, and precedent. And if we were to see the continued forging of a new body of “international law” exclusively in U.S. courts, might not such a body of law someday be turned against America’s own friends and trading partners and their interests? So long as the targets were the Ferdinand and Imelda Marcoses of the world, fleeing the Philippines for Hawaii, the friends of international law in many countries could embrace the substantive outcomes and largely refrain from lawyerly critique. Eventually, however, the targets were to become—we know where this is going, so no plot spoiler here—not Marcos (or the Lockerbie bombers, Manuel Noriega, nor any other classic villains of the 1980s and ‘90s), but corporations like Royal Dutch Petroleum.

VI. Does “Faux-International Law” Matter or Are These Merely Forms of Words?

Increasingly, everyone seems aware of the “faux-international law” problem, and increasingly desirous of not appearing, well, *imperial*

(or hegemonic, a word I will turn to later) in the course of American court pronouncements on the law of nations. We might ask, though, whether anything more is at stake than words. Why not concern ourselves instead with the law's functional role?

I don't think it can work this way—not in the long run. Although its functional role might start in American courts, it reaches out universally and globally. I say this as someone who is an unabashed American sovereigntist, a believer in American hegemony as the fundamental guarantor of basic order on the planet. I find myself somewhere between shock and awe at, well, thechutzpah, especially in the claim that it is still somehow international law. Beyond that, however, I think it unsustainable. And I'm strongly inclined—without any good evidence—to believe that the Court in *Kiobel* not only agrees with this, but is seeking, majority and minority alike, to undo the damage to the legitimacy of American legal interests done by the fiction that the ATS is about international law.

Through ATS, the United States has been exercising radically extraterritorial jurisdiction over occurrences in other countries. The sole source of legitimacy for doing so would be the claim that we are simply enforcing international law as recognized more or less universally in all nations. If not—if we are instead imposing distinctively American outcomes on these foreign disputes in a way that overrides the outcomes that the national legal systems involved would have generated—then foreign parties and their sovereigns have no reason to regard extraterritorial ATS litigation as anything other than bullying (but also preening) by a powerful state through its courts. And by now we have arrived at this point. Foreign parties don't regard the ATS as legitimate or as implementing genuine international law, and won't ever—not our close friends and allies, let alone China or Russia. Even the Canadians resent it.

And then we tell them that they will undergo the American tort system.

I should mention in my experience over the years of observing ATS cases, that judges do not share this view. They don't see it as any legal fiction here; they believe that they *are* pronouncing on international law. They sometimes take great pride in it, as carrying out universal moral obligations. Perhaps that is shifting, and perhaps it will shift particularly following *Kiobel*, with its strong reassertion that the ATS is about extraterritoriality and federal common law, not universal

jurisdiction and international law. But a year or two after *Sosa* was handed down, I was present as an expert witness at the Agent Orange ATS case before the Honorable—the inimitable—Jack Weinstein (district judge for the Eastern District of New York).²⁵ Judge Weinstein opened the oral argument by saying that, in some sense, the court sat as an international court, pronouncing on international law. I don't think many present at argument would disagree that he said this with a great deal of pride. He went on to repeat much the same language in his opinion.²⁶

It fell to a very young Justice Department lawyer, offering the government's statement of interest, to say with some trepidation—I paraphrase, and Judge Weinstein took this with all good humor—with all due respect, your Honor, this is not an international tribunal, but a federal district court convened under the authority of the Constitution and laws of the United States.

VII. The Corporate Turn in ATS Suits

In any case, none of this might have mattered. The ATS might have remained an American legal twist on universal jurisdiction, dealing with symbolically important cases but not taking on targets with the incentives and the resources to push back. It might have been seen as precisely what hegemony possessed of an interest in moral justice, legal technicalities aside, are supposed to do; the academics can carp and cry over international law in the law reviews. Besides, the United States was not completely alone in this legal innovation: Belgium, Spain, and several other countries also had some national form of quasi-universal jurisdiction, with a variety of restraints (shifting over time) on their national courts' exercise of jurisdiction, but nonetheless going beyond the traditional bases of jurisdiction. Part of the pressure exerted by these European national courts was through the ability of courts of one country within the European Union to be able to issue arrest warrants generally respected by other countries throughout the EU—as, for example, Chile's General Augusto Pinochet discovered when he was held in Britain in 1998.

²⁵ In re Agent Orange Product Liability Litigation, 373 F. Supp. 2d 7 (E.D.N.Y. 2005).

²⁶ *Id.* at 17 (“In judging international human rights claims against domestic corporations or others, courts in the United States with jurisdiction act as quasi international tribunals.”).

But these were generally criminal proceedings and limited to individual persons. The United States, by contrast, offers liability in civil tort asserted as a domestic law remedy. To some, the ATS has also seemed oddly morally off-base by seeming to proffer tort rather than criminal law as the appropriate legal response to such offenses as genocide or crimes against humanity. Surely only a criminal prosecution would morally do, at least in the first instance? The response is, to be sure, that victims will take what they can get; the ATS may not be a perfect fit in bringing victims justice, but it's still better than nothing. And, in practical litigation terms, an ATS lawsuit offers a far easier burden of proof for the plaintiffs to meet—the civil action standard of “preponderance of the evidence” rather than the criminal standard of “beyond a reasonable doubt.”

So runs the argument. But it is worth taking a closer look at the deep disconnect between the international and American conceptions here. Although the list of violations of international law that can be committed by private parties, as opposed to states, has expanded greatly in the modern era, it is still a short list. By and large, international law is still a law of states, with very limited applicability to private parties. The prohibitions aimed at private parties consist of *criminal* acts, for which wrongdoers are held *individually* criminally liable. There is currently no concept in international law of civil liability, or tort liability, of private parties—even bearing in mind that international law is a matter of plausible, pragmatic interpretation rather than certainty in many things, international law experts generally would, I believe, assent to these two assertions. One reason this can be asserted is that, institutionally, the international order offers no institutional locus for either civil liability or entity liability. To take one of the most obvious examples, the International Criminal Court has neither, and not for want of direct discussion during the ICC's establishment. This might conceivably change in the future, and there are certainly many people pressing to change it, but to date that is the situation.

The casual turn toward aiming ATS tort actions against corporations with deep, deep pockets—after all, the statute nowhere said that only individuals can be sued—was another departure from the general pattern of existing international law. So was the marked emphasis on “aiding and abetting” as a basis of liability; what this means in international law (that is, international law “out there”) remained

a matter of some considerable debate, even as American law eagerly raced ahead. And as mentioned above, the *Sosa* move in invoking Blackstone and the law as it stood in 1789 entirely unhinged the ATS from international law as practiced in the world at large.

A word more on the notion of freezing offenses mostly as they stood in 1789: When I say that no one but the U.S. Supreme Court would think of stopping where we stood then, I do not mean merely that the concepts of genocide and crimes against humanity are absent from the Founding account of the “law of nations” yet could not possibly be omitted from an account of that law today. Nor do I mean that the rest of the world has evolved various newer ideas in international law and must be listened to if we are to mean the “law of nations.” I mean, specifically, that no modern *American* would stop with 1789, even aside from the issues of genocide and crimes against humanity, because no modern American would defend a list that failed to include slavery, as Blackstone’s did.

Not only was slavery not part of Blackstone’s canon of unlawful acts for which individuals could be made answerable under the law of nations; it was part of the lawful American domestic order under what, by a reaching analogy, we might think of as the “federal common law” of 1789. So everyone recognized that some modern norms would have to be accepted. *Sosa* attempted to handle this by formulating a rule that new, modern norms would be admitted only if they exhibited a specificity and acceptance equivalent to norms accepted in Blackstone’s day.

The *Sosa* effort to fashion a standard was elegant, in its own way, and arguably correct in the abstract. As a practical instruction to judges hearing cases, however, it was discretionary and unpredictable, as well as encouraging pleading as an extreme sport, in which an ordinarily serious dispute about labor conditions, environmental standards, or health and safety, would be re-couched as accusations of genocide, crimes against humanity, slavery and forced labor, and so on. Some corporations might prefer to cut their losses and do as little damage to their reputations as possible; others, in my experience as an expert witness, took genuine umbrage at the accusations—often the most serious crimes in the international canon—and dug in to defend themselves.

The stakes were higher still because U.S. tort processes would be employed: American-style discovery, a presumption of the American

rule that each side pays its own costs, and all the other appurtenances of American civil litigation that have caused many foreign corporations to wonder whether they should even enter the U.S. market and thus become subject to this tort regime. The ATS meant that they could be sued in tort in any case, even without any other connection to the United States, a presence in the United States, or any of the standard bases of jurisdiction. Fear of the costs of discovery was, as always, a powerful inducement to settle—and even more so in cases that might involve plantations in Liberia, maquiladoras in Guatemala, or a Chinese corporation's treatment of workers in Asia or Africa. Multinational corporations of all nationalities were becoming concerned. They did not see that *Sosa* acted as much of a brake if the practical question was whether one could get the case dismissed on summary judgment, without going to discovery.

Foreign governments likewise were unhappy. In one of the most famous examples, they raised concerns that corporations that did business in apartheid-era South Africa might find arrangements struck in good faith with the South African government undermined by litigation under the ATS in the United States. The South African government had negotiated with the corporations that had been present in South Africa with many concerns in mind—getting paid something, while not driving business out of the country and losing jobs and economic activity over the long term. Was it really right for a U.S. court to unwind those arrangements on its own say-so through the ATS, when the corporations' home governments had raised no objection at the time? Moreover, foreign governments—including those of America's closest friends and allies, such as Canada, Britain, and the Netherlands—increasingly began to be concerned with the effects of ATS litigation on their own corporations.

Defenders of the ATS pointed out that U.S. judges had been accorded prudential discretion (which they often used) to curtail litigation under the statute in deference to national interests in foreign relations, comity with other nations, and the prerogatives of other branches of government. But it all remained maddeningly discretionary and unpredictable, from the standpoint of foreign governments and defendants alike—and all the more unfair and insupportable because it was untethered to actual international law processes in which their countries could participate.

Particularly after the financial collapse of 2008, another consideration also gained prominence: whatever sense the ATS made, it made as a “law of the hegemon”—an expression of the might of a superpower that could impose its will on everyone else and that was, for good measure, the home country of many, even most, of the world’s leading multinational enterprises. By the late 2000s, however, the hegemon’s place in the world was starting to look somewhat dicey. The centrality of the United States to the world economy had markedly declined, with major new economic powerhouses arising in China, India, Brazil, and elsewhere. The United States was in at least relative—if not absolute—decline. Yet here was its legal system continuing to assert the hubris of the superpower, as if it were still 1990.

VIII. The First *Kiobel* Argument and Corporate Liability

It long seemed to many observers that the Supreme Court would have to settle the corporate liability question. The opportune case arrived in the form of the Second Circuit’s sweeping rejection of corporate liability in its *Kiobel* decision in 2010. The circuit split was stark, and perhaps that made it more attractive as a vehicle for Supreme Court review.

The argument over corporate liability in ATS cases comes down to the relationship between the international law predicate of the statute and the domestic remedy also embedded in the statute. The argument that corporations cannot be defendants in ATS suits runs as follows: Corporations, unlike individuals or states, are not possible subjects of liability under existing international law and so cannot violate it. They lack the capacity to do so. International law might have been formulated differently, and might still one day, but today, corporations lack the legal capacity to violate international law. Since they cannot violate it, there is no violation, with respect to them, of the law of nations or a treaty of the United States. If there is no violation of international law by a party, there is no basis for a civil action against it by an alien, in tort, under the ATS. A violation requires a violator who is legally capable of being the violator; otherwise one has a harmful act but not a violation of international law. The argument against corporate liability in essence says that there isn’t a violation of international law, at least as it regards the corporation, and so there is no basis for an ATS suit.

The argument for corporate liability might attack two different points of this argument. First, it disputes the premise that there is no liability for corporations in international law. Despite some contrary academic opinion, however, it is probably reasonably accepted that international law up until now does not create liability for entities such as corporations.

Accepting the premise, then, the second point of attack is to deny that it matters who or what violated international law; it is enough that there is a violation for the ATS suit to go forward. Liability can be found against a party based not on the fact that it violated international law—the fact of a violation as such, without specific attribution as to the culprit—but on the basis that on U.S. tort law principles, the defendant would be liable. U.S. domestic tort law permits corporate liability, and having satisfied the requirement of an international violation—without regard to whether there is an actor in the international-law sense—the legal regime turns into ordinary American tort law, in which a corporation can be held liable. In a sort of cosmopolitan bait-and-switch, liability in domestic tort law can be assigned for a violation that has not been held to have a violator for purposes of the very international law that describes the substantive offense.

The two are severable, on this argument, and once having found actions that satisfy the international law predicate, then it is normal and accepted that a national court apply its own standards of procedure, liability, and remedy, which, in this case, involves identifying the liable actor under domestic law and imposing tort liability. This was the argument that predominated for corporate liability in the first round of *Kiobel* argument. How it would have come out is unknown, though it is likely to be addressed at some future point. It bears observing, however, that even in the corporate liability round of *Kiobel* argument, the conceptual debate has shifted radically from where it began back in the *Filártiga* era.

If the *Filártiga* era saw the ATS as part of a movement to create universal jurisdiction around certain norms of international law, the plaintiffs' best argument for corporate liability is a signal retreat from that. It is not an argument from international law; on the contrary, faced with the difficulty that its target is likely *not* a subject of international law to date, the move by plaintiffs is to retreat to emphasize the ordinary *domestic* nature of the ATS. It deemphasizes the idea of

universal jurisdiction of serious international law norms, emphasizing instead that liability is created, and the liable party identified, by operation of domestic law. The legal theory thus constitutes an extraterritorial application of a domestic law that merely contingently refers to the law of nations and treaties of the United States and the existence of some behavior that violates it, irrespective of the liability status of the actor in international law.

This is a remarkable change for the ideological trajectory of the ATS and its use. More than that, it is a remarkable change in the fortunes of the idea of universal jurisdiction in national courts. There are other international law drivers of change as well. The founding of the International Criminal Court, for example, establishes an international forum beyond national courts and takes pressure off them to offer universal access for serious human rights violations, principally. But the debate over corporate liability sets the stage for the second round of argument in *Kiobel*. The situation in the Court leading from the first argument to the second is mostly, and correctly, seen as a concern about foreign-cubed ATS suits seeming to have no connection to the United States. It is as if to say, even before talking about corporate liability and who can be a defendant, why is this case even here? Why U.S. courts at all? Or, as Justice Alito put it in the first oral argument:

The first statement—the first sentence in your brief in the statement of the case is really striking: “This case was filed . . . by twelve Nigerian plaintiffs who alleged . . . that Respondents aided and abetted the human rights violations committed against them by the Abacha dictatorship . . . in Nigeria between 1992 and 1995.” What does a case like that—what business does a case like that have in the courts of the United States?²⁷

What business, indeed? Other justices, notably Justice Kennedy and Chief Justice Roberts, pressed the same question, and hence the second round of argument the following term.

²⁷Transcript of Oral Arg. at 11, *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013) (No. 10-1491).

IX. The Second *Kiobel* Argument, Jurisdictional Bases, and Chief Justice Roberts's Application of the Presumption against Extraterritoriality

The *Kiobel* result was 9-0, but the reasoning split 5-4, with two additional short concurrences. Chief Justice Roberts's opinion describes *Sosa*'s holding and notes that it did not address the jurisdictionally prior question raised in *Kiobel*: whether the ATS may properly "reach conduct occurring primarily in the territory of a foreign sovereign." He describes the ATS as a statute that might be read to have extraterritorial reach; indeed, all of its universal-jurisdiction practice is bound to precisely that feature.

But in that case, the ATS must be tested against a presumption in U.S. practice—the presumption against extraterritoriality. In this regard, the *Kiobel* court emphasizes the importance of the presumption against extraterritoriality that it recently confirmed in *Morrison v. National Australia Bank*.²⁸ *Morrison* was a securities law case, and its concerns ran not to universal criminal norms of human rights but to ordinary international financial and securities transactions and the intersecting laws of different states governing them. In that regard, the Roberts opinion reaffirms that the presumption against extraterritoriality is not simply about cross-border economic or regulatory law but extends across other apparently unrelated subjects, such as international human rights law, as well. Alternatively, however, and far from insignificantly, one might see the application of *Morrison* to ATS cases involving corporate defendants as an implicit recognition of the economic reality of most of these ATS claims—they are not truly about gross human rights violations, genocide, slavery, or crimes against humanity at all, but instead quite ordinary (even if serious) disputes over labor and environmental issues as part of international business enterprises. Thus *Morrison*, as an economic law case, is particularly appropriate. Reliance upon *Morrison* can be seen as an implicit observation that the gap between the terms of pleading and the realities of corporate behaviors—even when they constitute genuine labor and environmental abuse deserving of a remedy or preventive regulation by the proper authority—could not be greater. The legal doctrine underpinning the assertion of *Morrison*'s presumption against extraterritoriality in the case of the ATS, however,

²⁸ *Morrison v. Nat'l Australia Bank Ltd.*, 130 S. Ct. 2869 (2010).

is that the ATS is about extraterritoriality and is thus to be located somewhere within the *traditional bases of jurisdiction*, rather than the special, international-law-driven category of *universal jurisdiction* (and all the conceptual difficulties and problems of keeping it cabined that this concept brings). It is a two-stage shift logically, though Chief Justice Roberts's opinion does not put it this way: first, a return to earth, as it were, in abandoning pretensions to international-law-driven universal jurisdiction and, second, in returning to the traditional categories of jurisdiction, landing on territoriality as the basis. Having landed on territory as the core criterion for ATS jurisdiction, Roberts then offers the presumption against extraterritoriality in such a way as to make territoriality something of a straitjacket that confines expansive claims of ATS jurisdiction or causes of action. A novel or judicially creative cause of action under the law of nations won't help a plaintiff if it won't apply beyond U.S. territory.

The presumption is explained, quoting *Morrison*, as being a judicially created canon of interpretation providing that "when a statute gives no clear indication of an extraterritorial application, it has none."²⁹ The opinion refers to the weighty concerns of the judiciary keeping itself out of the executive's role in foreign affairs and adds, quoting from *Microsoft Corp. v. AT&T Corp.*, that the presumption reflects the fact that "United States law governs domestically but does not rule the world."³⁰ Like *Morrison*, *Microsoft* is also a case about economic matters. The emphasis on the application of these economic law cases to what are supposed to be the deepest matters of human rights law suggests that the Court seeks to put the ATS back on the ordinary footing of other statutes, rather than tacitly treating it differently because of its long intertwining with human rights moralism. It also argues for a historically based, commonsensical understanding of the behaviors with which the First Congress would be concerned—behaviors that, with the exception of piracy and an inconsistent 1795 opinion by Attorney General William Bradford,³¹ would all take place on U.S. territory. The *Kiobel* majority plainly thinks that the ATS has been misconstrued by the courts for many years—though without significant pushback from the Court—and that in light of

²⁹ *Kiobel*, 133 S. Ct. at 1664 (quoting *Morrison*, 130 S. Ct. at 2878).

³⁰ *Id.* (quoting *Microsoft Corp. v. AT&T Corp.*, 550 U.S. 437, 454 (2007)).

³¹ Att'y Gen. William Bradford, *Breach of Neutrality*, 1 Op. Atty. Gen. 57 (1795).

historical research on its, in retrospect, not really so mysterious objectives, it should be returned to application on U.S. territory.

Finally, the emphasis on contemporary cases drawn from cross-border commerce, such as *Morrison* and *Microsoft*, offered to buttress the presumption against extraterritoriality, might subtly imply a view, *sotto voce*, that these corporate ATS cases are, in practical terms, what this essay has already described: efforts to cobble together a de facto scheme of cross-border liability-driven corporate regulation. By applying the presumption against extraterritoriality, Chief Justice Roberts tries to ensure that any such future scheme will be based on clear congressional provision.

This in effect pushes the ball back into Congress's court. If Congress wants to do as it did in the Torture Victim Protection Act and create detailed, specific conditions for extraterritorial reach, it can do so with regard to the ATS. But the courts will not do so. Moreover, the presumption operates along with the other requirements of *Sosa* as to permissible causes of action; though it is clear that most of the bite will come from the presumption. The chief justice passes lightly over an objection that Justice Breyer raises in his concurring opinion; the presumption against extraterritoriality is not thought to address a jurisdictional statute. The answer to this, for Roberts, is that the part of the ATS raising extraterritorial concerns is the part of the ATS that goes beyond conferring jurisdiction—the part, in other words, that *Sosa* said was necessary in order that it not be “stillborn.” As to the doctrine of “transitory torts”—which the plaintiffs emphasized in their arguments—the majority says that the ATS has to be treated like U.S. domestic law with regards to its causes of action:

The question under *Sosa* is not whether a federal court has jurisdiction to entertain a cause of action provided by foreign or even international law. The question is instead whether the court has authority to recognize a cause of action under U.S. law to enforce a norm of international law.³²

The chief justice's opinion is modest and leaves an escape hatch. The presumption against extraterritoriality is, after all, only a presumption, and might in some particular case be overcome; Justice Kennedy, too, emphasizes that the door is not completely shut in his

³² *Kiobel*, 133 S. Ct. at 1661.

brief concurrence. What might overcome the presumption, however, is not established plainly. More striking than the opinion's escape hatch is its implicit acknowledgment that its apparently sharply limiting rule, drawn from the presumption against extraterritoriality, is not enough to close the door to unwarranted ATS claims and requires a supplement. The opinion closes by adding that even where "claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption."³³ Which is to say that after having announced an apparently tough rule aimed at preventing the ATS from going abroad in search of monsters to destroy, the Roberts opinion recognizes that a territorially based rule is not actually enough to achieve its intended limits in the modern, inter-linked world. The practical reality is that so very many things might be said to touch or concern U.S. territory—an Internet message being passed through U.S. servers, for example, or the mere presence of an office in New York.

Thus, the presumption against extraterritoriality is not by itself sufficient to place out of reach all the activities that the majority intends to preclude. It has to be supplemented with an additional rule about territory itself: that a territorial claim of jurisdiction must be . . . well, the opinion does not say exactly, but it clearly means something more than mere or incidental. So the opinion concludes by toughening the substance of territoriality, observing that corporations "are often present in many countries, and it would reach too far to say that mere corporate presence suffices."³⁴ One might be forgiven for thinking that, in fashioning new, genuinely meaningful fetters on the ATS, it is this final toughening of the meaning of territoriality, rather than the presumption against extraterritoriality, that over time will do most of the work for the *Kiobel* majority. Justice Alito's concurrence, joined by Justice Thomas, doesn't even trust this additional toughening requirement and bolsters "touch and concern" by saying that claims will be barred unless the *domestic* conduct of a defendant "is sufficient to violate an international law norm that satisfies *Sosa's* requirements of definiteness and acceptance among civilized nations."³⁵

³³ *Id.* at 1669.

³⁴ *Id.*

³⁵ *Id.* at 1671 (Alito, J., concurring).

X. Justice Breyer's Concurrence and Its Holistic Approach to Jurisdiction

Justice Breyer's concurrence is a dissent by any other name—but not quite. It wants to have its cake and eat it too; it wants to have the “right” human rights cases available for redress under the ATS without letting it be used to cobble together a de facto civil liability regime for routine matters.

The most cosmopolitan of the justices, Justice Breyer would likely have been thought—back at the time of *Sosa*, for example, by me at least—to be the most receptive to establishing what were then termed “global government networks” of regulators or judges of different states, coming together at the informal administrative (rather than legislative or formal institutional) level, to establish coordination among participants in the network. Such an administrative solution might manage problems of coordination that political bodies such as the United Nations or the political leadership of national states would not manage successfully. It is easy to imagine that Justice Breyer, in the late 1990s or early 2000s, might have been drawn to the use of the ATS precisely in order to achieve a measure of civil-liability control over multinational corporations in the global supply chain or the global financial system. Not the United States courts as *custos morum* of the whole world, and less still an endorsement of the “law of the hegemon”—but a global network of judges doing something very much like that. He said as much in several speeches and appeared to embrace a genuinely technocratic vision of judging, the legitimacy of court systems, and the “horizontal” legitimacy of judges around the world as administrative mechanisms for harmonizing efforts to further the regulatory efficiency of the global system, at least in such matters as the economy, on the one hand, and human rights, on the other, and given its fragmented nature.

It is hard to see much of this technocratic cosmopolitanism in Breyer's *Kiobel* opinion, however. The world has changed with the rise of new, competitive, economically jostling great powers. On the contrary, even if he is obviously concerned to hold greater flexibility and discretion in reserve to apply the ATS in situations that are genuinely *hostis humani generis*—not dressed-up labor or environmental disputes—his opinion is no less committed than the chief justice's to relocating the proper jurisdictional basis for the ATS in the traditional

categories. It is not an offer to join the federal courts together with court systems worldwide to create a de facto, horizontally coordinated regime for regulating global corporations. It is, however, an offer to harmonize this aspect of U.S. jurisdictional rules with those of America's allies and friends who provided proposals for the United States based in genuinely international law, rather than what I have called in this essay "faux-international law."

Breyer affirmatively quotes the Restatement (Third) of Foreign Relations for these traditional international law categories and says, in effect, that the ATS ought to be limited to them, but also ought to be able to make use of all of them.³⁶ He criticizes the formal limitations of Roberts's narrow reliance on territoriality, in part by observing that piracy is a problem for the majority's approach, for example, because although piracy takes place on the high seas, the actual acts of piracy take place on ships, which are part of the flag territory. Considered more broadly, Justice Breyer's point is that, when all is said and done, the issue of limits for the ATS is whether there are sufficient contacts in any sense—territory, persons, causes, effects—close or substantial enough to satisfy a traditional, yet holistic, test. He sums this up as a three-part test of jurisdiction under the ATS:

(1) the alleged tort occurs on American soil, (2) the defendant is an American national, or (3) the defendant's conduct substantially and adversely affects an important American national interest, and that includes a distinct interest in preventing the United States from becoming a safe harbor (free of civil as well as criminal liability) for a torturer or other common enemy of mankind.³⁷

Breyer's approach, as he himself notes, is roughly the same as that taken by America's friends and allies in their amicus briefs to the Court. They do not see themselves as limited under the traditional grounds of international law to narrowly territorial approaches, as the Roberts opinion does. He purports to stake out approximately the same ground for the United States as our friends and allies stake out for themselves, and this involves a holistic approach to jurisdiction.

³⁶ *Id.* at 1671 (Breyer, J., concurring).

³⁷ *Id.* (Breyer, J., concurring).

The issues lie with the third alternative. The Breyer concurrence seems to make it rather easy on itself, in the sense of preserving all the freedom and discretion that the ATS already has, by defining important national interests to include American values, and defining a distinct interest in ensuring that the United States not become a safe harbor for genuinely bad people. This maneuver returns to the core concerns of the ATS cases of the 1980s and appears to implicate both persons present in the United States—Marcos, for example, or Peña-Irala, the Paraguayan police official—or their property, such as bank accounts or assets that, Breyer says, ought not to enjoy a safe harbor from criminal or civil liability.

Whether Justice Breyer means this in some distinctly “territorial” sense—the physical presence of persons or assets—he does not say. His opinion cites the ringing language of *Filártiga* as to the common enemies of mankind. But in his discussion of the case and its relevance to his third test, he places emphasis on rejecting precisely the element that Judge Kaufman thought was what made the ATS special—its *raison d’être*—the ATS as eliminating the need for any territorial, personal, or contacts-based notion of jurisdiction beyond the claims of human rights as such. On the contrary, Justice Breyer’s approach emphasizes the obligation not to serve as a safe harbor for very bad people (in human rights law terms) or their assets—while specifically making note that the defendant in *Filártiga* had found physical safe harbor in the United States, and stating that because the “defendant’s alleged conduct violated a well-established international law norm, and the suit vindicated our Nation’s interest in not providing a safe harbor, free of damages claims, for those defendants who commit such conduct.”³⁸ He makes the same observation of Ferdinand Marcos as well.

There are two points to make about Breyer’s third alternative. One is that if he is serious about denying safe harbor—allowing an ATS suit—based upon physical presence of the person, it is not clear that the Roberts approach would not treat the presumption as inapplicable in that case as well. In other words, when a “bad person” is (or perhaps was) in the United States, territoriality might well be satisfied for Chief Justice Roberts, at least in some situations. Second, however, Breyer’s test has to raise concerns that it is merely a path to

³⁸ *Id.* at 1675 (Breyer, J., concurring).

the same old problematic discretion to find jurisdiction, merely using new language, yet reaching the same results. For example, might a defendant's assets be deemed to have found "safe harbor" in the United States—and thus a possible claim under the ATS—because they pass through the Federal Reserve Wire Network ("Fedwire") for bank clearance, or some equally ephemeral contact?

The problem for Justice Breyer, as for Chief Justice Roberts, is that they cannot find a stable line between seeing the ATS as being genuinely about the common enemies of mankind—the "real deal," as it were—and the desire of many in the advocacy community to see the ATS as a mechanism for regulating transnational corporate enterprises in their ordinary functions. These activists see the ATS as effectively playing a regulatory role, particularly regarding labor and environmental issues—far indeed from genocide and crimes against humanity—and creating a *de facto* regime of international civil liability that the nations of the world have thus far somehow neglected to establish. The lesson from lower-court litigation is similar but with certain key distinctions: given a discretionary tool, district court judges seem mostly to want to create a global yet distinctly American tort regime—while forcing key claims into international-criminal-law categories of the most serious sorts imaginable.

Hence, the abiding question for Justice Breyer's third alternative: does it simply recapitulate the problem of squishiness that made *Sosa* unworkable? It is easy to read Breyer's third test so as to fit practically anything into the guise of national interests and a capacious notion of safe harbor. It is hard not to think that it permits judges who want the ATS to expand to expand it, and judges who want the ATS to contract to contract it—or, in other words, *Sosa* redux. And yet we must give Justice Breyer's *result* its due and acknowledge that he seems clearly to want to reframe the ATS debate away from universality and cosmopolitan justice. After all is said and done, the Breyer opinion concurs with the majority's result and denies that the contacts in *Kiobel* are sufficient to engage the ATS. That has to count for something.

XI. Conclusion

In a better world than ours, I suppose, Justice Breyer's approach is intellectually the more compelling one. It harmonizes with others in the world that we care about, and it returns the ATS to something

much more recognizable as international law. It is doctrinally more correct than the majority, as far as the bases of jurisdiction recognized in international and foreign relations law. Its assertion of American values as important, cognizable interests in the ATS need not be, in principle at least, a loophole through which to drive any and all results. And its emphasis on not providing safe harbor to very bad people and their assets has considerable merit.

Moreover, it bears observing one last time that both the Breyer and Roberts opinions are firmly rooted in a retreat to traditional cross-border jurisdictional principles in the correct perception that universal jurisdiction for civil liability in national courts is not a workable concept. And that in any case, what American jurisprudence called universal jurisdiction under the ATS was simply extraordinary—to others in the world—extraterritorial reach under a uniquely American statute. The claims to be carrying out the universal claims of international law rang hollow and illegitimate. Either the majority or the minority approach is an improvement over where ATS jurisprudence has gone, given the failure of *Sosa* to provide a clear rule, and especially since ATS litigation decisively took the “corporate” turn. The questions have not yet been fully answered—starting, peculiarly, with corporate liability and “aiding and abetting” liability, on which the Court might have been expected to pronounce, given that these were the issues originally granted certiorari and given that they were briefed and argued. American corporations have a strong interest in a clear Supreme Court ruling that corporations cannot properly be defendants in ATS cases.

At the end of the day, however, we don’t live in a better world; we live in the world of the American tort system. Certainly I do not believe that the Breyer approach offers enough practical protection against gradual expansion of claims and the erosion of levees that Breyer would claim have been sturdily erected. It simply preserves and assigns too much to discretion in the lower courts. The Roberts approach is less intellectually compelling, vastly cruder, sometimes inconsistent—and far more grounded in the reality of bringing to heel a form of law long since gone feral. The Breyer approach is intellectually perfectionist but likely ineffective; the Roberts approach is far from intellectually perfect, but its crude limits are likely to provide more effective signals of lines not to be crossed.

ATS litigation is thus transformed by *Kiobel*, but the ATS is by no means dead. Even if disputes are now framed as arguments over extraterritoriality rather than universal jurisdiction, alternative theories of jurisdiction and liability are already emerging.³⁹ For that matter, state courts and state law have begun to provide an alternative outlet for litigation under the rubric of “transnational torts.”⁴⁰ Moreover, days after the Court handed down the *Kiobel* decision, it accepted review in *Bauman v. DaimlerChrysler*—a 2011 Ninth Circuit case holding that Daimler AG, a German parent company with no operations or employees in the United States, could be sued under the ATS for human rights abuses allegedly committed by an Argentine subsidiary aiding and abetting the Argentine government during its “dirty war” of the 1970s, solely on the theory that the parent company had sufficient contacts with California through its U.S.-distribution subsidiary to support personal jurisdiction.⁴¹

It might seem obvious that *Kiobel* ought to moot that decision, but the questions are not the same as an acknowledged “foreign-cubed” case because at issue is whether and what contacts are sufficient to establish personal jurisdiction. *Bauman* is really an attempt by the plaintiffs to turn a foreign-cubed case into one by which agency theory provides a path to finding personal jurisdiction—and thus is no longer entirely “foreign” or premised purely on “universal” considerations. In other words, the case is an attempt to sidestep the formal doctrine of legal separation of corporate entities; it asserts a view that multinational corporate enterprises are to be treated as essentially one economic entity. This is, indeed, a plausible view of their globally unitary economic substance, but by arguing for economic substance over legal form, it renders impossible any real legal principle for why any particular national court should or should not hear a case.

³⁹ For an excellent summary of this debate, see *Opinio Juris*’s online symposium on the ATS after *Kiobel*. An Hertogen, *Kiobel* Insta-Symposium Insta-Roundup, *Opinio Juris*, Apr. 18, 2013, <http://opiniojuris.org/2013/04/18/kiobel-insta-symposium-insta-roundup> (collecting all contributions).

⁴⁰ See Roger Alford, *Kiobel* Insta-Symposium: The Death of the ATS and the Rise of Transnational Tort Litigation,” *Opinio Juris*, Apr. 17, 2013, <http://opiniojuris.org/2013/04/17/kiobel-insta-symposium-the-death-of-the-ats-and-the-rise-of-transnational-tort-litigation>.

⁴¹ *DaimlerChrysler AG v. Bauman*, 133 S. Ct. 1995 (2013) (No. 11-965) (granting cert. petition).

Chief Justice Roberts's requirement of "touch and concern" will likely start to be fleshed out in *Bauman*—as too will the next permutation of Justice Breyer's *Kiobel* approach. And perhaps the first thing we will discover in *Bauman* is that "touch and concern" is, in fact, a more holistic consideration of jurisdiction, beyond territory as such, to draw upon personal jurisdiction and "contacts" in a holistic way (holistic, that is, whether used to go forward or to dismiss). Such a result would lead—particularly with Justice Kennedy's (almost inevitable) warning in his short *Kiobel* concurrence that he won't be bound by a mechanical rule and anticipates many unanticipated permutations down the ATS road—to a somewhat ironic question as to whether the *Kiobel* majority's "touch and concern" will turn out to invite just as much discretion among the lower courts as *Sosa* did and Justice Breyer's national-interest balancing test threatens to do.

Still, as former State Department legal adviser John Bellinger has observed of the Court's decision to review *Bauman*, many believe that

the Court would not have accepted the case unless it plans to reverse the Ninth Circuit. Conservative justices are loathe to miss an opportunity to try to curb the Ninth Circuit's consistent efforts to be a world court, and the more liberal justices may have wanted to demonstrate (as Justice Breyer argued in his concurrence in *Kiobel*) that the extraterritorial reach of the Alien Tort Statute can be limited by other jurisdictional restrictions.⁴²

But the jurisdictional restrictions Bellinger refers to, on all sides of the Court, are drawn from the standard, traditional bases of jurisdiction. To be sure, the proper invocation of jurisdiction in transnational economic affairs might arise as an issue in many more avenues of legal dispute than simply the ATS. Whatever the legal avenue, however, our world is becoming one in which economic activity reaches across many borders, with many degrees of business involvement, presence, and activity. It is also a world in which the number of political and economic powers with a robust sense of their sovereign rights and a protective attitude toward their domestic corporations

⁴² John Bellinger, Justice Department Urges Supreme Court to Reverse Ninth Circuit in *Bauman v. DaimlerChrysler*, Lawfare, Jul. 12, 2013, <http://www.lawfareblog.com/2013/07/justice-department-urges-supreme-court-to-reverse-ninth-circuit-in-bauman-v-daimlerchrysler>.

is increasing, not decreasing. Battles over the proper assertion of jurisdiction in a globalized world are likely only to get hotter. Yet that is in part precisely because the standard bases of jurisdiction, with all their complexities of doctrine in the United States and elsewhere, are now squarely at issue.⁴³ Universal jurisdiction, being essentially political rather than legal, was always legally simpler by comparison.

⁴³As this article goes to press, the Second Circuit has issued a new ruling in a long-running ATS case, dismissing all substantive claims as barred by the Supreme Court's decision in *Kiobel*. *Balintulo v. Daimler AG*, No. 09-2778-cv(L), 2013 WL 4437057 (2d Cir. Aug. 21, 2013). In an opinion written by Judge José Cabranes (who also wrote the Second Circuit opinion in *Kiobel*), the court described *Kiobel* as holding that "federal courts may not, under the ATS, recognize common-law causes of action for conduct occurring in the territory of another sovereign" and, moreover, that it was not relevant whether the defendant was a U.S. or foreign corporation. *Id.* at *1. While agreeing with the Second Circuit's outcome, I am uncertain that the Supreme Court—and in particular Justice Kennedy—would endorse such a broad reading of *Kiobel*'s majority opinion. *Balintulo* illustrates at a minimum, however, that the argument over jurisdiction under the ATS is likely to shift from the presumption against extraterritoriality as such to an argument over what Chief Justice Roberts's opinion meant by "touch and concern." How much "touching" and "concerning" is enough?